

Mar 29, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

JOHN BERT HEATH,

Defendant/Movant.

No. 2:15-CR-06013-EFS
[No. 4:17-CV-05210-EFS]

**ORDER DISMISSING 28 U.S.C. § 2255
MOTION AS UNTIMELY**

Before the Court is Defendant/Movant John Bert Heath's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. ECF No. 59.¹ Mr. Heath seeks to vacate his conviction for Transfer of Obscene Material to Minor based on allegations of disproportionate sentencing, ineffective assistance of counsel, and misconduct by the Government. *Id.* For the following reasons, Mr. Heath's Motion is dismissed as untimely.

I. Facts and Procedural History

On August 11, 2015, Mr. Heath pleaded guilty to Transfer of Obscene Material to Minor in violation of 18 U.S.C. § 1470. See ECF No. 37. On November 16, 2015, pursuant to the binding plea agreement, ECF No. 35,

¹ All record citations refer to the underlying criminal case, No. 2:15-CR-06013-EFS.

1 the Court sentenced Mr. Heath to 96 months' imprisonment followed by a
2 3-year term of supervised release. ECF No. 54 at 2-3.

3 On December 18, 2017, Mr. Heath filed the instant Motion, ECF
4 No. 59. Mr. Heath argues the Court's sentence was disparate, his
5 counsel was ineffective and "threaten[ed]" and "coerce[d]" him into
6 accepting the plea agreement, the prosecutor utilized an
7 unconstitutional "scheme" to enhance his offense level and manipulated
8 the Court into a higher sentence, and the Court erred by declining to
9 reduce Mr. Heath's Guideline calculation by three points for acceptance
10 of responsibility. See ECF No. 59 at 2-3, 5. He further argues that
11 because "more than 90% of criminal cases result in plea agreement," it
12 is "virtually incomprehensible that any reasonable jurist would believe
13 that the defendant before him has accepted a plea knowingly and
14 voluntarily." ECF No. 59 at 5.

15 On January 24, 2018, the Court entered an order explaining that
16 Mr. Heath's § 2255 motion appeared to be untimely. Mr. Heath's judgment
17 became final on December 1, 2015. ECF Nos. 52 & 54; see Fed. R. App.
18 P. 26(a)(1). Accordingly, the § 2255 limitations period expired one year
19 later, on December 1, 2016. See 28 U.S.C. § 2255(f). The Court offered
20 Mr. Heath 60 days to either (1) file a supplement explaining why his
21 § 2255 motion was timely or (2) withdraw his motion. ECF No. 60 at 4.
22 The Court further explained that if Mr. Heath did not take one of those
23 two actions by March 23, 2018, his § 2255 motion would be dismissed as
24 untimely. ECF No. 60 at 5. Mr. Heath did not take any action until
25 March 27, 2018, when he filed a supplemental brief arguing that his
26 Motion is not time-barred. ECF No. 61.

1 v. *DiGuglielmo*, 544 U.S. 408, 413 (2005)). A movant must show that the
2 extraordinary circumstances "were the cause of his untimeliness" and
3 that they were caused by an "external force." *United States v. Buckles*,
4 647 F.3d 883, 889 (9th Cir. 2011) (internal quotations and citations
5 removed); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011. "Oversight,
6 miscalculation or negligence on [the movant's] part" preclude the
7 application of equitable tolling. *Id.* (citing *Harris v. Carter*, 515 F.3d
8 1051, 1055 (9th Cir. 2008)).

9 **III. Analysis**

10 On January 24, 2018, the Court permitted Mr. Heath 60 days to
11 either file a supplement explaining why his § 2255 motion is timely or
12 to voluntarily withdraw his motion. ECF No. 60 at 4. In that Order, the
13 Court clearly explained that if Mr. Heath did not take one of the above
14 actions by March 23, 2018, his motion would be dismissed. ECF No. 60 at
15 5. In his untimely supplement, Mr. Heath did not explain why he failed
16 to comply with the Court's Order or give any reason why he could not do
17 so. See ECF No. 61 at 2-3. Accordingly, the Court dismisses Mr. Heath's
18 motion as untimely.

19 Even if Mr. Heath had filed his supplemental brief within the 60-
20 day deadline, the Court would still dismiss his motion as untimely.
21 Although Mr. Heath states – in a conclusory manner – that his motion is
22 not time-barred, he has not informed the Court of any "extraordinary
23 circumstances" that prevented him from filing his § 2255 motion within
24 the one-year limitations period. See *Holland*, 560 U.S. at 649. Nor has
25 he made any other showing why his motion is timely.

26 /

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant/Movant John Bert Heath's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, ECF No. 59, is **DENIED**.

2. This file shall remain **CLOSED** and the Clerk's Office is directed to **CLOSE** the related civil file, No. 4:17-CV-05210-EFS.

3. The Court **DECLINES** to issue a certificate of appealability.
See 28 U.S.C. §2253(c)(2)

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide a copy to the United States Attorney's Office for the Eastern District of Washington and to Mr. Heath.

DATED this 29th day of March 2018.

____s/Edward F. Shea_____
EDWARD F. SHEA
Senior United States District Judge